U.S. Department of Justice
Criminal Division
Asset Forfeiture and Money Laundering Section

Quick Release

A Monthly Survey of Federal Forfeiture Cases

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Forfeiture and Restitution

- **Forfeiture and restitution are not mutually exclusive. The defendant may be ordered to forfeit criminal proceeds and pay restitution to the victims in the same case.**

- **Seventh Circuit holds that because there is nothing wrong with making the defendant pay twice, he is not entitled to reduce the restitution by the amount of the forfeiture.**

Defendant, who perpetrated a fraud scheme against the U.S. Postal Service, was convicted of mail fraud and money laundering. The district court entered an order under 18 U.S.C. § 982(a)(1), forfeiting various cars, trucks, tractors, and homes that Defendant purchased with the fraud proceeds. The court also ordered Defendant to pay $349,000 in restitution to the U.S. Postal Service.

Defendant objected to being subjected to both forfeiture and restitution. He argued that the district court's failure to reduce the restitution order to reflect the value of the property forfeited constituted double punishment and gave the Government a windfall double recovery. Moreover, he argued that the forfeiture left him with insufficient personal resources to satisfy the restitution order. Thus, he said, the effect of the forfeiture was to deny the victim full recovery. The **Seventh Circuit** rejected both arguments and affirmed the forfeiture and restitution orders.

Criminal forfeiture, the court stressed, is mandatory, while restitution under 18 U.S.C. § 3663(a)(1) is discretionary. Thus, the issue was whether the district could have properly exercised its discretion in ordering Defendant to make full restitution to the victim without any setoff for the amount forfeited.

Nothing in the statutory scheme requires such a setoff, the court held, nor is there anything wrong with making the defendant pay twice. In 1996, the Third Circuit rejected the suggestion that a civil forfeiture following a restitution order in a criminal case constituted double punishment in violation of the Double Jeopardy Clause. *See United States v. Various Computers*, 82 F.3d 582 (3d Cir. 1996). The same rationale, the court said, applies to the entry of a criminal forfeiture order and an order of restitution in the same case. Quoting *United States v. Various Computers*, the court held that:

> "[P]aying restitution plus forfeiture at worst forces the offender to disgorge a total amount equal to twice the value of the proceeds of the crime. . . . [T]his is in no way disproportionate to the harm inflicted upon [G]overnment and society by the offense."

Therefore, the district court was not obliged to reduce the restitution order by the amount of the forfeiture.

The fact that the victim was the U.S. Postal Service—a government agency—did not make any difference. Criminal forfeiture, the court held, seeks to punish the defendant by transferring his ill-gotten gains to the Department of Justice's Assets Forfeiture Fund. Restitution, on the other hand, seeks to make the victim whole. These are separate purposes that resulted, in this case, in payments to separate government agencies. Thus, Defendant could not argue that the Government would receive a "windfall" through his payment of both forfeiture and restitution.

Finally, the court rejected the notion that either the forfeiture or the restitution order should be vacated because Defendant was left with insufficient funds to make the victim whole. Again, the forfeiture is mandatory. Thus the only question was whether the district court should have declined to enter the restitution order because of the defendant's inability to pay. There was no error, however, because the defendant was not truly indigent. Through his perpetration of the fraud scheme, the court said, Defendant had exhibited an enormous talent for making money, which allowed the district court properly to conclude that he would one day earn an income sufficient to allow him to satisfy the restitution order. Thus, despite his current lack of resources (due to the forfeiture order), the entry of the restitution order was appropriate. —*SDC*

United States v. Emerson, ___ F.3d ___, No. 96-3166, 1997 WL 643034 (7th Cir. Oct. 20, 1997). Contact: AUSA Steve Sanchez, AILC01(ssanchez).

Comment: In a footnote, the panel noted that it could have based its decision on the relation back doctrine. That is, it could have found that the forfeited property belonged to the Government, not the defendant and, therefore, the defendant had no basis to argue that he was being made to "pay twice" when ordered to make restitution. But the court found it unnecessary to invoke this rationale "because we find nothing in the statutes or the case law that prevent a district court from using its discretion to order both forfeiture and restitution." —*SDC*

Criminal Forfeiture / Preliminary Order of Forfeiture

- **A preliminary order of forfeiture is final as to the defendant and is therefore immediately appealable.**
- **Defendant's attempt to appeal from the final order of forfeiture, entered at the conclusion of the ancillary proceeding, was untimely; Defendant was required to appeal from the preliminary order.**
- **The district court retains jurisdiction to hear third-party claims in the ancillary proceeding notwithstanding defendant's appeal from the preliminary order of forfeiture.**

Following Defendant's conviction in a drug case, the court entered a preliminary order of forfeiture under section 853. Defendant appealed the conviction but did not appeal from the forfeiture order. The conviction was affirmed.

While the appeal was pending, the court conducted an ancillary proceeding pursuant to section853(n). When no third party claims were filed, the court entered a final order of forfeiture giving the United States clear title to the forfeited property. The final order was entered two years after the preliminary order.

Defendant then filed an appeal from the final order of forfeiture. The Government opposed the appeal on the ground that Defendant should have appealed from the preliminary order and that his attempt to appeal from the final order was out of time.

The **Sixth Circuit** agreed. A preliminary order of forfeiture, the court held, is final as to the defendant and is therefore immediately appealable. "The actual effect of a preliminary forfeiture order is clearly that of a final order as to the defendant. A preliminary forfeiture order terminates all issues presented by the defendant and leaves nothing to be done except to enforce by execution what has been determined."

The court acknowledged that a preliminary order is not final as to third parties, but it held that the court retains jurisdiction to hear third-party claims while the defendant's appeal from his conviction and from the preliminary order of forfeiture is pending. Thus, Defendant was required to file a timely appeal from the preliminary order under Fed. R. App. P. 4(b), and his attempt two years later to appeal from the final order of forfeiture was out of time.

Finally, Defendant attempted to challenge the final order of forfeiture on the ground that it failed to take into account his wife's interest in the forfeited property. The court dismissed this argument in a single sentence, noting that it is "well-established that a defendant has no standing to assert his wife's [third-party] rights" in a criminal forfeiture proceeding.

—SDC

United States v. Christunas, ___ F.3d ___, No. 96-1340, 1997 WL 597461 (6th Cir. Sept. 30, 1997). Contact: AUSA Kathleen Moro Nesi, AMIE01(knesi).

Special Verdicts / Standing / Hearsay / Interest

- **Property was subject to forfeiture even though jury returned inconsistent special verdicts, finding the property forfeitable under some theories but not forfeitable under others.**

- **Control over a "family" bank account may be sufficient to satisfy threshold standing requirements at the onset of trial, but the claimant still must prove his ownership interest by a preponderance of the evidence. A gift is not sufficient, under state law, to confer standing on the recipient unless the gift is unconditional.**

- **Co-conspirator hearsay statements are admissible in a civil forfeiture trial under the same rules as a criminal trial. The Government need not have alleged conspiracy in its pleadings.**

- **If money is found forfeitable, the Government is also entitled to forfeiture of interest earned by that money.**

A civil forfeiture case was tried to a jury. At the conclusion of the evidence, the court propounded five special interrogatories to the jury, peculiarly couching four of them as double negatives. For example, the first interrogatory was:

> "Do you find from a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was not the proceeds of and was not used to facilitate drug trafficking activity?"

Similarly, the next three interrogatories asked whether any part of the currency was (2)not involved in a financial transaction to promote drug trafficking, (3)not transferred from the U.S. outside to promote drug trafficking, and (4) not a monetary transaction greater than $10,000 in currency derived from drug trafficking.

The court explained why the interrogatories were framed this way: after the Government establishes probable cause to forfeit, the burden of proof is on the claimant to show that the property is not connected with drugs. The interrogatories were framed to inquire whether claimant had met his burden. In other words, if the jury found that any part of the $9 million was *not* forfeitable under the proposed theory, it would answer "yes" to the interrogatory. If it found that all of the money was forfeitable under that theory, it would answer "no."

The court then added a fifth interrogatory which it instructed the jury to answer only if it answered "yes" to one of the first four questions. That is, if the jury found that some part of the money was *not* forfeitable under one of the theories, it was to indicate, in dollars and cents, what part of the money was not forfeitable.

The jury answered "no" to interrogatories 1, 2, and 4 and "yes" to interrogatory 3. With reference to interrogatory 5, the jury found that $1.1 million was not subject to forfeiture. Unsurprisingly, the claimant argued after trial that he should get that $1.1 million back, but the court held otherwise, and ordered the forfeiture of the entire $9 million.

The court conceded that the jury's finding that $1.1 million was not subject to forfeiture was facially inconsistent with its verdict on interrogatories 1, 2, and 4. But it held that in responding to the fifth interrogatory, the jury was merely expressing its view that $1.1 million was the amount not forfeitable under the Government's third theory—the international transportation of the funds. It did not mean that the $1.1 million was not forfeitable under the other three theories. Thus, the verdicts could be reconciled, and

the entire amount was forfeited under theories 1, 2, and 4 even if only part of it could be forfeited under theory 3.

In any event, the court held that the claimant had not demonstrated a sufficient ownership interest in the defendant money, under state law, to have standing to contest the forfeiture. Claimant's basis for standing was that the currency was deposited, as a gift, into a bank account for his use and the use of his family. The court found that control over the bank account containing the funds was sufficient to satisfy the standing requirement as a threshold matter, but that did not relieve the claimant of his burden of proving an ownership interest in the funds by a preponderance of the evidence at trial. Because the claimant did not prove that he had received an unconditional transfer of the currency, as would be required under Texas law to be a valid gift, he failed to established standing.

The court also held that co-conspirator hearsay statements are admissible in a civil forfeiture trial under the same rules as in a criminal trial.

Finally, the court ruled that if money is found forfeitable, the Government is also entitled to interest earned by that money because the interest is proceeds attributable to the drug trafficking. —*BB*

United States v. $9,041,598.68, ___ F. Supp. ___, No. CIV-A-H-95-3182, 1997 WL 557376 (S.D. Tex. Apr. 25, 1997). Contact: AUSA Sue Kempner, ATXS01(skempner).

Comment: This case illustrates the pitfalls of attempting to craft a special verdict form that allows a jury, notwithstanding its verdict that property is subject to forfeiture, to set forth a dollar amount that it finds is, or is not, subject to forfeiture. Such verdicts are easily susceptible of conflicting interpretations unless they are drafted with great care. The use of the double-negative interrogatories in this case only compounded the confusion that was likely to result in this situation. —*SDC*

Excessive Fines / Standing

- **Forfeiture of $105,000 residence involved in drug transactions over a two-year period is not an excessive fine under the Eighth Amendment.**
- **Claimant's wife lacked standing because under South Dakota law a spouse does not have any vested rights in his or her mate's property during the course of their marriage.**

The Government moved for summary judgment in a civil forfeiture action against real property under 21 U.S.C. § 881(a)(7). After considering and rejecting claimant's excessive fine argument and claimant's wife's innocent owner argument, the court held that there were no genuine material issues of fact as to either claim and that the Government was entitled to the summary judgment as a matter of law.

In rejecting claimant's excessive fine argument, the court conservatively estimated that 3.5 pounds of methamphetamine with a street value of $84,000 to $123,000 were illegally transacted at claimant's

residence from October 1994 until at least September 1996. Noting that the drug transactions occurred over a substantial period of time and the claimant's residence was valued at $105,000, the court concluded that forfeiture of the real property would not be grossly disproportionate.

As to the wife's innocent owner argument, the court found that there was a genuine issue of fact regarding the wife's knowledge of her husband's illegal drug transactions, but if, as a matter of state law, the wife is not an owner or a lienholder of the property, her knowledge of the illegal activity is irrelevant because she lacks standing to contest the forfeiture. According to South Dakota law, a spouse does not have any vested rights in the property of his or her mate during the course of their marriage. Consequently, the court held the wife did not have standing. —*HSL*

United States v. One Parcel of Property Located at 1512 Lark Drive, ___ F. Supp. ___, No. CIV-96-5093, 1997 WL 598086 (D.S.D. Sept. 22, 1997). Contact: AUSA Ted McBride, ASD01(tmcbride).

Facilitation / Probable Cause / Excessive Fines

- **Forfeiture of a residence used to distribute marijuana is justified under the Second Circuit's excessive fines test, which takes into account both the harshness of the forfeiture and the relationship between the seized property and the offense.**

- **When calculating a claimant's maximum penalty for purposes of comparing that amount against the specified value of a residence subject to forfeiture, in order to determine the harshness of a forfeiture, the court may consider the amount that claimant would have been fined under federal guidelines, even where the criminal behavior was prosecuted in state court.**

Acting in response to complaints lodged by neighbors, local police surveilled the defendant's property for two months, witnessing a significant number of short-term visits by nonresidents. The police later obtained and executed a search warrant and found baggies of marijuana packaged for sale, currency, drug records and drug paraphernalia. The owner was arrested, pleaded guilty to state charges, and was sentenced to probation and community service. A forfeiture action against the residence was commenced in district court pursuant to 21 U.S.C. § 881(a)(7).

Neighbors then complained that the owner was trafficking drugs from her residence while on probation, resulting in a second search of the defendant's property and seizure of marijuana, cash, and drug paraphernalia. The owner was convicted of a probation violation and resentenced to a term of incarceration. She filed a claim to contest the forfeiture of her property, asserting that the forfeiture would be an excessive fine in violation of her Eighth Amendment rights.

First, the court found that the Government established probable cause to believe the property was used to facilitate drug offenses. The circumstantial evidence established a nexus between the drug activity and the defendant's property, and no credible evidence was offered by the claimant to rebut the Government's showing of probable cause.

Next, the court, in analyzing whether the forfeiture of the property violated the excessive fines clause, considered both the harshness of the forfeiture and

the relationship between the property and the offense—the elements set forth in *United States v. Milbrand*, 58 F.3d 841 (2nd Cir. 1995). The court refused the claimant's request to modify the *Milbrand* analysis by considering such facts as the disproportion of the resale value of the seized marijuana compared to the value of the house, and the application of the seized and forfeited funds to law enforcement interests associated with the investigation of the claimant's trafficking activities. In analyzing the harshness of the forfeiture, the court compared the value of the forfeited property to the statutory maximum federal penalties that could be imposed against the claimant upon conviction. Reasoning that the value of the defendant property was $56,000, while the claimant could have been fined $500,000 and jailed for ten years, the court determined that the forfeiture was not too harsh.

In analyzing the relationship between the defendant property and the offense, the court held that the home was important to the success of the illegal activity as the drugs, records and paraphernalia were stored there, and claimant met customers on the premises. Noting that the claimant proffered no innocent owner defense, the court determined that the residence was forfeited as facilitating property. —*WJS*

United States v. 219 Ingersol Street, Albion, NY, No. 93-CV-933C, ___ WL _____ (W.D.N.Y. Oct. 3, 1997) (unpublished). Contact: AUSAs Joseph Karaszewski, ANYW01(jkarasze), and Gregory Brown, ANYW01(gbrown).

Federal Tort Claims Act

■ **Exception under 28 U.S.C. § 2680(c) to Government's liability under the Federal Tort Claims Act (FTCA) bars claims for compensation for property lost or damaged after seizure for forfeiture.**

Plaintiff entered into a stipulation and release agreement with the Government for the return of personal property that the Drug Enforcement Administration (DEA) had seized for forfeiture from his residence in connection with his arrest in a criminal investigation. When Plaintiff claimed that several seized items were not returned and that many of the returned seized items were damaged, he sued the United States for compensation for damaged and lost property under the FTCA (28 U.S.C. §§ 1346(b), 2671-2680).

The Government moved for dismissal based on the exception to the FTCA's waiver of the Government's sovereign immunity from suit that bars:

> "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer."

28 U.S.C. § 2680(c). Plaintiff made two arguments against the applicability of section 2680(c)'s exception. First, Plaintiff argued that the property that the Government has lost is no longer in the Government's possession and, therefore, cannot be regarded as being "detained" for purposes of section 2680(c), *see Mora v. United States*, 955 F.2d 156, 160 (2d Cir. 1992) (relying on *Alliance Assurance Co. v. United States*, 252 F.2d 529, 533-34 (2d Cir. 1958). Second, Plaintiff argued that section 2680(c)'s language referring to "any other law enforcement officer" does not include DEA agents, but is limited to federal officers engaged in activities related to customs or excise, *see Kurinsky v. United States*, 33 F.2d 594, 596-598 (6th Cir. 1994), *cert.*

denied, 514 U.S. 1082, 115 S. Ct. 1793 (1995); *Bazuaye v. United States*, 83 F.3d 482, 483-487 (D.C. Cir. 1996).

The court dismissed Plaintiff's FTCA claims holding that section 2680(c)'s exception to the Government's liability under the FTCA applies not only to claims for damage to detained property, but also to claims for the loss of detained property, and that DEA agents are "law enforcement officers" for purposes of section 2680(c). The court found that in *Kosak v. United States*, 465 U.S. 848, 104 S.Ct. 1519 (1984), the Supreme Court had rejected the *Alliance Assurance* loss-is-not-detention rationale and that, consequently, it was difficult to make sense of the Second Circuit's subsequent reliance on it in *Mora*. The court also found that *Kosak's* broad reading of section 2680(c) to include *all* claims arising out of the detention of goods "strongly suggests" that section 2680(c) bars claims for property lost, as well as for property damaged, while detained by the Government.

Concerning the applicability of section 2680(c) to law enforcement officers not engaged in customs or excise activities, the court relied for guidance on the Congress's general purposes as observed by the Supreme Court in *Kosak*, 465 U.S. at 858, for enacting the FTCA's exceptions: (1) ensuring that certain Government activities not be disrupted by the threat of suits for damages; (2) avoiding exposure of the Government to liability for excessive or fraudulent claims; and (3) not extending coverage of the FTCA to suits for which adequate remedies are already available.

The court concluded that, although the third purpose does not clearly support inclusion of officers engaged in detentions not involving the customs or excise laws under section 2680(c) (*see Bazuaye*, 83 F.3d at 484-86) the first two purposes are applicable with equal force to property detentions related and unrelated to customs or excise activities.

—JHP

Schreiber v. United States, ___ F. Supp.___, No. 96-CIV-0122(KMW), 1997 WL 563338 (S.D.N.Y. Sept. 8, 1997). Contact: AUSA Pierre Gentin, ANYS14(pgentin).

Comment: In another case, *Garcia v. United States*, No. 97-C-5926, 1997 WL 656210 (N.D. Ill. Oct. 15, 1997) (unpublished), Plaintiffs filed a state court action against federal agents, alleging that the agents who seized their property were liable for conversion. The Government removed the action to federal court, and filed a motion to dismiss. The court granted the motion, holding that the plaintiffs' sole remedy was under the Federal Tort Claims Act which requires a plaintiff first to pursue an administrative claim.

—SDC

Administrative Forfeiture / Court of Federal Claims

■ **Court of Federal Claims has no jurisdiction to decide suit by property owner seeking either return of administratively forfeited property or damages.**

Plaintiff sued in the Court of Federal Claims seeking damages for what she termed a wrongful seizure and forfeiture of property that was administratively forfeited under 21 U.S.C. § 881(a)(6). The court dismissed the complaint for lack of jurisdiction. The **United States Court of Appeals for the Federal Circuit** affirmed, explaining that the lower court lacked jurisdiction for the following reasons:

It had no jurisdictional basis to determine whether Plaintiff had been given adequate notice because it lacks the federal question jurisdiction that the district courts enjoy under the Administrative Procedures Act.

It has jurisdiction under the Tucker Act only where an award of money damages is provided. But money damages for a wrongful taking cannot be awarded under the Tucker Act. It could not order return of the forfeited car because it can only order money damages.

Finally, the appellate court held that Plaintiff might have a viable claim under the Tucker Act on a theory of recovery of an exaction illegally imposed by federal officials. However, the Tucker Act provides jurisdiction in the Court of Federal Claims for such suits only where Congress has not expressly placed jurisdiction elsewhere. But for forfeitures, Congress has placed jurisdiction elsewhere—in the district courts. —*BB*

Crocker v. United States, ___ F.3d ___, No. 97-5059, 1997 WL 583698 (Fed. Cir. Sept. 22, 1997), *aff'g* 37 Cl. Ct. 191 (1997). Contact: AUSA Elizabeth W. Newson, civ02.po.enewson.

Excessive Fines

■ **Supreme Court hears oral argument in *United States v. Bajakajian.***

On November 4, 1997, the Supreme Court heard oral argument on the Government's appeal from the Ninth Circuit's decision in *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996). In that case, the Court of Appeals held that *any* forfeiture for a currency reporting violation was excessive *per se*, because the unreported currency is not an instrumentality of the offense.

The Justices did not tip their hand at the oral argument as to their views on the merits of the case, but their questioning indicated that they were searching for an appropriate analysis that would permit them to uphold the forfeiture of the unreported currency in most cases. Indeed, even defense counsel did not attempt to defend the Ninth Circuit's *per se* rule, but suggested that some sort of proportionality test would be appropriate. The Government's lawyer, Irv Gornstein of the Office of the Solicitor General, argued that the undeclared currency was an "instrumentality" of the offense and that forfeiture of such instrumentalities would always fall within the ambit of the Eighth Amendment.

The Justices seemed receptive to the instrumentality argument, or to a hybrid in which they

could hold that a forfeiture is proportionate to the crime if the property was an instrumentality. Justice Scalia, for example, asked defense counsel if he would not concede that certain forfeitures are always constitutional—such as the forfeiture of an illegal firearm used in the commission of a crime—regardless of the value of the property. He added that it seemed to him that a forfeiture of the exact amount of money not declared on the CMIR form was "perfectly proportionate" to the crime.

Justice Souter asked several times why the forfeiture in a CMIR case was not analogous to the forfeiture of undeclared, duty-free goods in a U.S. Customs case. In each case, he said, there is a social ill that Congress has addressed through forfeiture, and in each case the forfeiture appears to be "inherently proportionate" to the crime.

Justice O'Connor suggested that another proportionality test might be appropriate. She questioned why the Court should just ask if the forfeiture was grossly disproportionate to the maximum criminal fine for the offense. Justice Breyer questioned whether that the failure to declare $350,000 (as in *Bajakajian)* was necessarily 35 times as serious as the failure to declare $10,000, but he agreed that it was a more serious crime and would justify a larger forfeiture. He indicated that he favored an approach such as that adopted in the Sentencing Guidelines, whereby more serious offenses justify more serious punishment on a sliding, nonlinear scale. He seemed concerned, however, that whatever test the Court adopted should not allow the 700 district court judges in the United States to come up with 700 different tests. When he asked defense counsel how he would avoid this result under a purely proportionality test, counsel was unable to provide an answer.

Chief Justice Rehnquist and Justice Kennedy both returned to this point several times. The Chief Justice suggested that it would not be desirable to allow the district courts to come up with 700 different tests, "all of which would be correct." Thus, whatever the Court does, it seems likely that they will attempt to produce a bright-line, objective standard that permits the forfeiture of most, if not all, of the money in CMIR cases without allowing the district court to exercise so much discretion that the result would vary greatly from case to case based on nuances in the facts.

—*SDC*

United States v. Bajakajian, No. 96-1487 (argued Nov. 4, 1997). Contact: AFMLS Attorneys Harry Harbin, CRM20(hharbin), or Stef Cassella, CRM20(scassell).

Quick Notes

■ Fugitive Disentitlement Doctrine

The **Second Circuit** holds that a person who becomes a fugitive from justice in a civil case—*e.g.*, a person who fails to appear for a properly-noticed deposition and then fails to respond to an order to appear before the district court—is subject to the fugitive disentitlement doctrine. Thus, the court is free to dismiss the fugitive's appeal from an adverse judgment in the civil case. The court distinguished the Supreme Court's recent decision in *Degen v. United States*, 116 S. Ct. 1777 (1996), on the ground that *Degen* involved a person who was a fugitive in a related *criminal* case, not the civil case in which the disentitlement doctrine was applied.

Empire Blue Cross and Blue Shield v. Finkelstein, 111 F.3d 278 (2d Cir. 1997) (not a forfeiture case).

■ Excessive Fines

Creating an exception to the rule that the forfeiture of "proceeds" is never excessive, the Eighth Circuit holds that a forfeiture money judgment, equal to entire amount realized as proceeds of bank fraud scheme, is excessive as applied to a minor participant who, unlike her co-defendants, reaped little benefit personally. Apparently, the minor participant was included in the money judgment under the theory that all defendants are "joint and severally" liable for the entire amount subject to forfeiture.

United States v. Van Brocklin, 115 F.3d 587 (8th Cir. 1997). Contact: AUSA Robert Mandel, ASD01(rmandel).

■ Alien Smuggling

A driver who assists his passenger in entering the United States illegally—*e.g.*, by misrepresenting the passenger's place of birth to the immigration official at the U.S.-Canadian border, and handing the official false documents—commits a violation of 8 U.S.C. § 1324(a)(1)(A)(iv), and his car may be forfeited under 8 U.S.C. § 1324(b).

United States v. One 1989 Mercedes Benz, 971 F. Supp. 124 (W.D.N.Y. 1997). Contact: AUSA Gregory Brown, ANYWR01(gbrown).

■ Venue

Under 28 U.S.C. § 1355(b)(1), venue for a civil forfeiture action lies in the district where a related criminal case is pending, regardless of the location of the property. Accordingly, a forfeiture action against real property in New Jersey was properly filed in the Eastern District of Pennsylvania where the criminal charges were brought.

United States v. Premises Known as 6 Tenby Court, No. CIV-A-90-6610, 1997 WL 549989 (E.D. Pa. Aug. 26, 1997) (unpublished). Contact: AUSA Maryann Donaghy, APAE02(mdonaghy.

■ Pre-judgment Interest

A district court in Missouri followed the Ninth Circuit rule in awarding a successful claimant pre-judgment interest. Following *United States v. $277,000*, 69 F.3d 1491 (9th Cir. 1995), the court held that the Government is required to disgorge any interest actually earned on the claimant's money, or if the money was not deposited in an interest-bearing account, the amount of interest "constructively earned," based on what the Government avoided having to borrow to finance the national debt by virtue of its possession of the claimant's money. However, another judge in the same district reached the opposite result on the same issue, refusing to apply *United States v. $277,000* in a case where there the seizing agency simply returned the property to the claimant without filing a complaint for forfeiture.

Brooks v. United States, No. 4:94CV01045 GFG (E.D. Mo. Oct. 14, 1997) (interest awarded); ***Glasgow v. D.E.A.***, No. 91CV1949 JCH (E.D. Mo. Sept. 8, 1997) (interest denied). Contact: AUSA Ray Meyer, AMOE01(rmeyer).

■ Joint and Several Liability

A district court in New Orleans affirmed its prior ruling that defendants were jointly and severally liable to satisfy a criminal forfeiture judgment. The court explained that the United States could collect the property and proceeds subject to forfeiture only once, but it could recover the entire amount from either one of the defendants.

United States v. Cleveland, No. CRIM-A96-207, 1997 WL 602186 (E.D. La. Sept. 29, 1997) (unpublished). Contact: AUSA Lyman Thornton, ALAM01(lthornto).

Legislation

■ Forfeiture Reform Bill Draws Opposition

The Hyde-Conyers asset reform bill, H.R. 1965, that was approved by the House Judiciary Committee by a vote of 26-1 last summer, appears stalled on its way to the House floor for a final vote. With Congress set to adjourn for this year in early November, no vote has been scheduled on the legislation that would comprehensively revise the civil asset forfeiture laws. As of this date, it appears most likely that Chairman Hyde will schedule the bill for a vote after Congress returns in January 1998.

The reason for the slowdown in moving the bill toward enactment is that the defense attorneys, civil liberties groups and other anti-forfeiture groups that supported the original Hyde bill were disappointed with the compromise that Chairman Hyde worked out with the Department of Justice, and are now lobbying against it. Their hope is to defeat the bill in its present form, force Chairman Hyde to abandon the changes and additions that he made to accommodate federal law enforcement, and try to enact a bill more to their liking before Congress adjourns for the elections in 1998.

The following are excerpts from some of the materials the anti-forfeiture groups are circulating in opposition to H.R. 1965.

"[H.R. 1965] pays lip service to reforms from the real forfeiture reform bill which FEAR backed—H.R. 1835—but takes away the desirability of each of the reforms by creating exceptions that swallow the rule and/or conditions that make it so onerous to obtain the relief that it is not worth the price."

—Forfeiture Endangers American Rights (F.E.A.R.)

"This bill would represent one small step forward and two very large steps back for forfeiture reform. Under this legislation, the [G]overnment would be allowed to continue its abusive forfeiture tactics and citizens will be exposed to new and possibly more harmful forfeiture laws."

—American Civil Liberties Union

"This legislation contains provisions that would allow the Clinton-Gore Administration to seize the assets of virtually any business on any pretext—including firearms-related businesses! . . . H.R. 1965 is a Clinton-Reno scheme—and a civil rights nightmare—and we strongly believe it will be used as a tool against gun stores, collectors, or anyone else who has a firearms collection or inventory worth stealing."

—National Rifle Association

"[The bill makes] it a felony to interfere with the seizure or forfeiture of property by "removing" it. One effective way to remove property from the jurisdiction of a U.S. court is to move it outside the United States. This section would effectively ban any such transfer if the effect of that transfer would be to frustrate a U.S. criminal forfeiture order. Will Congress next impose the death penalty for maintaining assets outside the United States to frustrate forfeitures, as Nazi Germany did in 1936?"

—Asset Protection International

"[H.R. 1965] allows the court to appoint counsel to represent indigent property owners. But this worthy concept is bastardized in this bill. The court decides whether or not to appoint counsel after considering the following factors: (1) the value of the property; (2) how badly the person needs it; and (3) whether the person's case is meritorious. Even worse, the court makes these decisions after a

hearing in which the [G]overnment is permitted to put the property owner on the stand and question him."

—Forfeiture Endangers American Rights (F.E.A.R.)

"We have examined the bill, and it is a nasty piece of work."

—Conservative Consensus

"We are deeply disappointed that the bill ultimately reported out of the Judiciary Committee is seriously flawed and we cannot support it in its current form. The Committee managed to take a swan of legislation and turn it into an ugly duckling."

—American Civil Liberties Union

"An apparent effort to appease the U.S. Department of Justice, [H.R. 1965] contains many provisions that make the legislation worse than no reform at all."

—American Civil Liberties Union

"This bill would, in most cases, make the forfeiture laws even worse. . . . Under H.R. 1965, your rights as a gun owner or businessman would be considerably diminished."

—Gun Owners of America

"[The bill allows] release of property to avoid hardship. Here again a laudable goal is bastardized in this bill. In order to obtain release of the property, the property owner has to convince the court of ALL of these things: (1) he has standing and his claim is not frivolous; (2) he has enough ties to the community to trust him to protect his own property and surrender it to the [G]overnment if he loses; (3) letting the [G]overnment hold the property pending trial "will cause substantial hardship to the claimant, such as preventing the claimant from working, leaving the claimant homeless, or preventing the functioning of a business;" (4) the hardship to the property owner outweighs the risk the property will be lost, removed or diminished in value; and (5) that the property is not currency or monetary instruments (with an exception for assets of a business which has been seized), or evidence, and it not specifically designed or especially suited for illegal activities; and that the property is not likely to be used to commit further crimes if returned to the owner.

'The property owner has to prove all of those things before getting his property released pending trial. Few property owners will qualify under these impossible standards. . . . These provisions are obnoxious. They are worse than current law, and we should not accept them as 'forfeiture reform.'"

—Forfeiture Endangers American Rights (F.E.A.R.)

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Your forfeiture cases, both published and unpublished, are welcome. Please fax your submission to Denise Mahalek at (202) 616-1344 or mail it to:

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